

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NANCY M. GOINGS,)
) No. CV-05-0341-MWL
Plaintiff,)
) ORDER GRANTING DEFENDANT'S
v.) MOTION FOR SUMMARY JUDGMENT
)
JO ANNE B. BARNHART,)
Commissioner of Social)
Security,)
)
Defendant.)
)

BEFORE THE COURT are cross-motions for summary judgment, noted for hearing without oral argument on August 14, 2006. (Ct. Rec. 13, 20). Plaintiff Nancy M. Goings ("Plaintiff") did not submit a reply brief. Attorney Lana Cece Glenn represents Plaintiff; Special Assistant United States Attorney Johanna Vanderlee represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 20) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 13).

JURISDICTION

Plaintiff protectively filed an application for Supplemental Security Income ("SSI") benefits on July 30, 1998, alleging disability since December 1, 1997, due to lower back pain, leg pain, knee pain, hysterectomy, atypical connective tissue disease carpal tunnel syndrom and TMJ. (Administrative Record ("AR") 115-118, 127). Her application was denied initially and on reconsideration. On December 19, 2000, and February 15, 2001, Plaintiff appeared before Administrative Law Judge ("ALJ") Richard Hines. (AR 54-102). On February 15, 2001, testimony was taken from Plaintiff, medical expert R. Thomas McKnight, Ph.D., and vocational expert J. D. Flynn, Ed.D. (AR 54-95). On May 4, 2001, the ALJ issued a decision finding Plaintiff not disabled. (AR 19-25). The Appeals Council denied Plaintiff's request for review on October 3, 2002 (AR 7-9), and Plaintiff filed a complaint in this Court on November 26, 2002 (Civil Action No. CS-02-0408-CI). On September 3, 2003, the United States District Court for the Eastern District of Washington remanded the case for additional proceedings.

The ALJ conducted a new hearing on July 15, 2004,¹ at which time testimony was taken from Plaintiff and medical expert Glen Almquist, M.D. (AR 559-583). On May 19, 2005, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 364-382). The Appeals Council denied a request for review on October 3, 2005. (AR 346-348). Therefore, the ALJ's decision became the

¹Plaintiff filed a new SSI claim on July 23, 2002, and she filed a hearing request on February 26, 2003, after the new claim was denied at the initial and reconsideration levels. (AR 364-365). The ALJ consolidated the claims for one decision to be issued. (AR 365).

1 final decision of the Commissioner, which is appealable to the
2 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed
3 this action for judicial review pursuant to 42 U.S.C. § 405(g) on
4 October 27, 2005. (Ct. Rec. 2).

5 **STATEMENT OF FACTS**

6 The facts have been presented in the administrative hearing
7 transcript, the ALJ's decision, the briefs of both Plaintiff and
8 the Commissioner and will only be summarized here. Plaintiff was
9 59 years old on the date of the ALJ's decision, has a Master's
10 degree in social work and has past work experience as a special
11 education teacher intern, hospital social worker, telephone
12 counselor, weight loss counselor, and telemarketer. (AR 129,
13 365).

14 **SEQUENTIAL EVALUATION PROCESS**

15 The Social Security Act (the "Act") defines "disability" as
16 the "inability to engage in any substantial gainful activity by
17 reason of any medically determinable physical or mental impairment
18 which can be expected to result in death or which has lasted or
19 can be expected to last for a continuous period of not less than
20 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
21 Act also provides that a Plaintiff shall be determined to be under
22 a disability only if his impairments are of such severity that
23 Plaintiff is not only unable to do his previous work but cannot,
24 considering Plaintiff's age, education and work experiences,
25 engage in any other substantial gainful work which exists in the
26 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

27 Thus, the definition of disability consists of both medical and

28 ///

1 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
2 (9th Cir. 2001).

3 The Commissioner has established a five-step sequential
4 evaluation process for determining whether a person is disabled.
5 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he is
6 engaged in substantial gainful activities. If he is, benefits are
7 denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If he is not, the
8 decision maker proceeds to step two, which determines whether
9 Plaintiff has a medically severe impairment or combination of
10 impairments. 20 C.F.R. §§ 404.1520(c), 416.920(c).

11 If Plaintiff does not have a severe impairment or combination
12 of impairments, the disability claim is denied. If the impairment
13 is severe, the evaluation proceeds to the third step, which
14 compares Plaintiff's impairment with a number of listed
15 impairments acknowledged by the Commissioner to be so severe as to
16 preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(d),
17 416.920(d); 20 C.F.R. § 404 Subpt. P App. 1. If the impairment
18 meets or equals one of the listed impairments, Plaintiff is
19 conclusively presumed to be disabled. If the impairment is not
20 one conclusively presumed to be disabling, the evaluation proceeds
21 to the fourth step, which determines whether the impairment
22 prevents Plaintiff from performing work he has performed in the
23 past. If Plaintiff is able to perform his previous work, he is
24 not disabled. 20 C.F.R. §§ 404.1520(e), 416.920(e). If Plaintiff
25 cannot perform this work, the fifth and final step in the process
26 determines whether Plaintiff is able to perform other work in the
27 national economy in view of his residual functional capacity and

28 ///

1 his age, education and past work experience. 20 C.F.R. §§
2 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

3 The initial burden of proof rests upon Plaintiff to establish
4 a *prima facie* case of entitlement to disability benefits.

5 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
6 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
7 met once Plaintiff establishes that a physical or mental
8 impairment prevents him from engaging in his previous occupation.
9 The burden then shifts to the Commissioner to show (1) that
10 Plaintiff can perform other substantial gainful activity and (2)
11 that a "significant number of jobs exist in the national economy"
12 which Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
13 (9th Cir. 1984).

14 STANDARD OF REVIEW

15 Congress has provided a limited scope of judicial review of a
16 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
17 the Commissioner's decision, made through an ALJ, when the
18 determination is not based on legal error and is supported by
19 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
20 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
21 1999). "The [Commissioner's] determination that a plaintiff is
22 not disabled will be upheld if the findings of fact are supported
23 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
24 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
25 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
26 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance.
27 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
28 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d

1 573, 576 (9th Cir. 1988). Substantial evidence "means such
2 evidence as a reasonable mind might accept as adequate to support
3 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
4 (citations omitted). "[S]uch inferences and conclusions as the
5 [Commissioner] may reasonably draw from the evidence" will also be
6 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
7 On review, the court considers the record as a whole, not just the
8 evidence supporting the decision of the Commissioner. *Weetman v.*
9 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
10 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

11 It is the role of the trier of fact, not this court, to
12 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
13 evidence supports more than one rational interpretation, the court
14 may not substitute its judgment for that of the Commissioner.
15 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
16 (9th Cir. 1984). Nevertheless, a decision supported by
17 substantial evidence will still be set aside if the proper legal
18 standards were not applied in weighing the evidence and making the
19 decision. *Browner v. Secretary of Health and Human Services*, 839
20 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
21 evidence to support the administrative findings, or if there is
22 conflicting evidence that will support a finding of either
23 disability or nondisability, the finding of the Commissioner is
24 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
25 1987).

26 ///

27 ///

28 ///

ALJ'S FINDINGS

The ALJ found at step one that Plaintiff has not engaged in substantial gainful activity since her alleged onset date. (AR 366).² At step two, the ALJ determined that Plaintiff has the severe impairments of cervical degenerative disease and low back pain, but that she does not have an impairment or combination of impairments listed in or medically equal to one of the Listings impairments. (AR 377). The ALJ specifically found that Plaintiff failed to demonstrate that she has a mental impairment that has posed more than minimal limitations on her ability to perform work-related activities. (AR 377).

The ALJ concluded that Plaintiff retained the residual functional capacity ("RFC") to preform a wide range of light work. (AR 378). Specifically, the ALJ held that Plaintiff retained the following functional capacity: a lifting capacity of up to 25 pounds occasionally and 10 pounds frequently, the ability to stand or walk about six hours in an eight-hour work day, sit (with normal breaks) for a total of about six hours in an eight-hour work day, push and pull with her upper extremities would be limited due to cervical spine abnormalities, she could frequently climb stairs and ramps, occasionally climb ladders, ropes and scaffolds, occasionally balance, stoop, kneel, crouch, and crawl and needed to avoid concentrated exposure to heights. (AR 378).

///

///

²The ALJ noted that Plaintiff had worked 25 hours per week from January to May 1998; however, the earnings from this employment did not amount to totals consistent with substantial gainful activity, and the work was performed prior to filing her application for SSI. (AR 366).

1 At step four of the sequential evaluation process, and based
2 on Plaintiff's RFC and the vocational expert's testimony, the ALJ
3 found that Plaintiff was able to perform her past relevant work as
4 a special education teacher intern, an instructional aide, a
5 hospital social worker, a telephone counselor and a weight loss
6 counselor. (AR 380-381). Therefore, the ALJ determined at step
7 four of the sequential evaluation process that Plaintiff was not
8 disabled within the meaning of the Social Security Act. (AR 381-
9 382).

10 ISSUES

11 Plaintiff contends that the Commissioner erred as a matter of
12 law. Specifically, she argues that:

13 1. The ALJ erred by failing to conclude at Step Three that
14 Plaintiff's impairments, when combined, equaled a Listings
15 impairment under the musculoskeletal criteria of 1.04;

16 2. The ALJ erred by improperly rejecting the testimony of
17 Plaintiff's treating and examining physicians;

18 3. The ALJ erred by relying on the opinion of the medical
19 expert over the weight of the medical evidence presented; and

20 4. The ALJ erred by relying on a hypothetical presented to
21 a vocational expert at an earlier hearing to support a finding
22 that Plaintiff was not disabled in this matter.

23 This court must uphold the Commissioner's determination that
24 Plaintiff is not disabled if the Commissioner applied the proper
25 legal standards and there is substantial evidence in the record as
26 a whole to support the decision.

27 ///

28 ///

DISCUSSION

A. Medical Evidence

Plaintiff contends that the ALJ erred by improperly rejecting testimony from her treating and examining physicians of record. (Ct. Rec. 16, pp. 39-44). Plaintiff also argues that the ALJ erred by relying on the testimony of the medical expert over the weight of the medical evidence presented. (Ct. Rec. 16, pp. 44-46). The Commissioner responds that the ALJ properly considered and evaluated the medical evidence of record. (Ct. Rec. 21, pp. 12-18).

The courts distinguish among the opinions of three types of physicians: treating physicians, physicians who examine but do not treat the claimant (examining physicians) and those who neither examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81 F.3d 821, 839 (9th Cir. 1996). A treating physician's opinion is given special weight because of his familiarity with the claimant and his physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989). Thus, more weight is given to a treating physician than an examining physician. *Lester*, 81 F.3d at 830. However, the treating physician's opinion is not "necessarily conclusive as to either a physical condition or the ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 7474, 751 (9th Cir. 1989) (citations omitted).

The Ninth Circuit has held that "[t]he opinion of a nonexamining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician." *Lester*, 81 F.3d at 830. Rather, an ALJ's decision to reject the opinion of a

1 treating or examining physician, may be *based in part* on the
2 testimony of a nonexamining medical advisor. *Magallanes*, 881 F.2d
3 at 751-55; *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995).
4 The ALJ must also have other evidence to support the decision such
5 as laboratory test results, contrary reports from examining
6 physicians, and testimony from the claimant that was inconsistent
7 with the physician's opinion. *Magallanes*, 881 F.2d at 751-52;
8 *Andrews*, 53 F.3d 1042-43. Moreover, an ALJ may reject the
9 testimony of an examining, but nontreating physician, in favor of
10 a nonexamining, nontreating physician only when he gives specific,
11 legitimate reasons for doing so, and those reasons are supported
12 by substantial record evidence. *Roberts v. Shalala*, 66 F.3d 179,
13 184 (9th Cir. 1995).

14 The ALJ determined that Plaintiff retained the RFC to preform
15 a wide range of light exertion level work activities. (AR 378).
16 Specifically, the ALJ held that Plaintiff retained the following
17 functional capacity: a lifting capacity of up to 25 pounds
18 occasionally and 10 pounds frequently, the ability to stand or
19 walk about six hours in an eight-hour work day, sit (with normal
20 breaks) for a total of about six hours in an eight-hour work day,
21 push and pull with her upper extremities would be limited due to
22 cervical spine abnormalities, she could frequently climb stairs
23 and ramps, occasionally climb ladders, ropes and scaffolds,
24 occasionally balance, stoop, kneel, crouch, and crawl and needed
25 to avoid concentrated exposure to heights. (AR 378).

26 Plaintiff provides a list of individuals who have treated or
27 examined Plaintiff, including Danielle Riggs, ARNP, Dr. Mackey-
28 Hargadine, Dr. Quinn, Dr. Remple, Dr. Dentler, Dr. Marineau, Dr.

1 Arguinchona, and Dr. Wymore, and argues, in general terms, that
2 the ALJ erroneously rejected the opinions of these medical
3 professionals and improperly relied on the testimony of the
4 medical expert. (Ct. Rec. 16, pp. 39-46). Plaintiff's specific
5 argument, however, is that the ALJ improperly rejected the
6 opinions of Dr. Dentler. (Ct. Rec. 16, pp. 42-43).

7 Bruce Dentler, M.D., first examined Plaintiff on January 25,
8 2001. (AR 333). Plaintiff was seen by Dr. Dentler "for
9 initiating some records and proceedings for [a] disability court
10 hearing in February." (AR 333). It was noted that she was not
11 taking regular medications and did not request medications at the
12 time of the exam. (AR 333). Dr. Dentler noted that Plaintiff's
13 low back was significantly impaired and further noted restricted
14 motion with range of motion maneuvers. (AR 333). However, the x-
15 rays ordered by Dr. Dentler during that visit were negative except
16 for minor degenerative changes in the lumbosacral facets. (AR
17 334).

18 On February 1, 2001, Dr. Dentler noted that Plaintiff
19 returned to "help [him] complete the functional capacity part of
20 her Social Security Disability application." (AR 440). Dr.
21 Dentler had Plaintiff demonstrate the movements and "together"
22 they completed the forms. (AR 440). It was noted that Plaintiff
23 was not requesting medication. (AR 440). A Residual Functional
24 Capacity Questionnaire form and a form entitled Medical Assessment
25 of Ability to Do Work-Related Activities (Physical) were completed
26 on February 1, 2001. (AR 336-342). Dr. Dentler marked that
27 Plaintiff was restricted to occasionally lifting and carrying up
28 to 20 pounds and frequently lifting and carrying up to 10 pounds.

1 (AR 336, 339). Dr. Dentler noted several other restrictions and
2 indicated that Plaintiff experienced moderate to severe pain. (AR
3 338).

4 On February 22, 2001, Dr. Dentler noted that Plaintiff was
5 "not doing too badly right now" and attributed prayer, moderate
6 exercise, stretching, and lumbar support as being very helpful.
7 (AR 441). On May 3, 2001, Plaintiff returned to Dr. Dentler
8 because she needed a slip about her medical care so that she could
9 pick up her food stamps. (AR 443). On August 8, 2001, Plaintiff
10 returned to have an application filled out attesting to her
11 disability in order for her to have a deduction on her housing
12 allowance. (AR 444). On May 2, 2002, Dr. Dentler noted that
13 Plaintiff was doing pretty well right now. (AR 452). He
14 indicated that he reviewed conservative treatment with Plaintiff
15 and noted that Plaintiff could stretch and do moderate activity,
16 such as walking, bicycling and swimming. (AR 452).

17 On August 8, 2002, Dr. Dentler saw Plaintiff for an update on
18 her disability and completed the same disability forms he
19 completed on February 1, 2001, with similar findings. (AR 453-
20 461). Dr. Dentler noted that Plaintiff's physical capacity had
21 been updated for her attorney since Plaintiff continued to apply
22 for social security disability. (AR 453). On June 17, 2004, Dr.
23 Dentler again updated the same forms. (AR 522-529). The results
24 were similar but contained additional restrictions in repetitive
25 hand motions for grasping, pushing and pulling and fine
26 manipulation. (AR 522-529).

27 ///

28 ///

1 The ALJ gave a very detailed review and analysis of the
2 record. (AR 366-380). With regard to Dr. Dentler, the ALJ
3 indicated that he considered the restrictions outlined by Dr.
4 Dentler and rejected those opinions. (AR 379-380). The ALJ
5 indicated that the majority of Dr. Dentler's office notes show
6 that no physical examinations were performed and that Plaintiff's
7 main objective was completion of forms related to her efforts to
8 get state and federal disability, food stamps and reduced housing.
9 (AR 379). The ALJ noted that Plaintiff provided the physician
10 with a written history which he based his opinions on, and Dr.
11 Dentler noted that he had Plaintiff help him complete the
12 disability forms. (AR 379). The ALJ indicated that Dr. Dentler's
13 opinions appeared to be based on Plaintiff's subjective
14 complaints, as opposed to objective findings, and the ALJ
15 concluded that Plaintiff was not entirely credible (a finding not
16 contested by Plaintiff in this case). (AR 379). The ALJ further
17 indicated that, given the fact that the record revealed that
18 Plaintiff and Dr. Dentler prayed together, the level of
19 involvement of Dr. Dentler appeared to go beyond an objective
20 physician/patient relationship. (AR 380).

21 On March 27, 2000, Plaintiff was examined by Dr. Monroe
22 related to her complaints of lower back pain. (AR 290-294). Dr.
23 Monroe indicated that Plaintiff was able to climb on and off the
24 exam table without difficulty, took her footwear on and off with
25 smooth movement and no hesitation, did not stand during the
26 interview other than when asked, was able to be seated in a chair
27 with no observed difficulty, did not assume abnormal postures or
28 shift positions while seated with undue frequency, and rose from a

1 seated position without noted difficulty. (AR 291-293). Dr.
2 Monroe noted that, upon examination of her back, she had no spasm
3 palpate, nor was it tender. (AR 293). Plaintiff was observed to
4 walk with no limp or list and walked on her toes without
5 difficulty. (AR 294). Dr. Monroe diagnosed a history of carpal
6 tunnel syndrome, with negative sign's on physical exam, possible
7 knee degenerative joint disease and a history of back and neck
8 injury with chronic pain. (AR 294).

9 On October 31, 2002, a state agency reviewing physician
10 completed a residual functional capacity assessment form. (AR
11 431-438). The reviewing physician opined that Plaintiff retained
12 the capacity to occasionally lift and carry 20 pounds, frequently
13 lift and carry 10 pounds, sit or stand and/or walk for a total of
14 about six hours in an eight hour workday, and push and/or pull
15 without restriction. (AR 432). It was noted that Plaintiff
16 should never climb ladders, ropes or scaffolds and should only
17 occasionally climb ramps or stairs, balance, stoop, kneel, crouch
18 or crawl. (AR 433). The reviewing physician indicated that
19 Plaintiff was occasionally limited with handling and fingering
20 with her right hand. (AR 434).

21 At the administrative hearing held on July 15, 2004, Glen
22 Almquist, M.D., a medical expert in orthopedic medicine,
23 testified. (AR 562-580). Dr. Almquist testified that Dr.
24 Dentler's records reveal that Dr. Dentler was helping Plaintiff
25 work on her application for disability and that Dr. Dentler was
26 overstating her condition. He testified that an x-ray of her back
27 was fairly negative, and examinations demonstrated normal range of
28 motion of her neck, back and knees. Dr. Almquist testified that

1 Plaintiff did not have an impairment that met or equaled Listing
2 1.04A under step three of the sequential evaluation process. (AR
3 574-575). Dr. Almquist further stated that Plaintiff would have
4 the following work-related limitations: occasionally lift or
5 carry 20 pounds; frequently lift or carry 10 pounds; sit, stand,
6 or walk two hours at a time; sit for a total of about eight hours
7 in an eight-hour workday, alternating sitting, standing and
8 walking; frequently climb stairs; occasionally climb ladders,
9 stoop, bend and kneel; no restrictions of hands related to
10 gripping, pushing, pulling and fine manipulation; she could
11 frequently perform below shoulder height reaching and occasional
12 above shoulder reaching; and should not work at unprotected
13 heights. (AR 575).

14 Charles E. Brondos, M.D., at the request of the ALJ,
15 evaluated Plaintiff for cervical and low back pain on August 24,
16 2004. (AR 547-549). Dr. Brondos, a neurologist, indicated that
17 there were no objective abnormalities upon examination. (AR 547).
18 Examination revealed normal range of motion, strength, sensation
19 and reflexes. (AR 547, 549). He indicated that while there were
20 issues with chronic pain, there were no objective abnormalities or
21 findings suggestive of spinal cord or nerve root involvement. (AR
22 549). He reported that there was no indication from the
23 evaluation to warrant restrictions on day-to-day activities. (AR
24 549).

25 The undersigned finds that the rationale provided by the ALJ
26 for rejecting the opinions of Dr. Dentler was clear and convincing
27 and supported by substantial record evidence. The weight of the

28 ///

1 record evidence, including the opinions of Dr. Monroe, Dr.
2 Brondos, and the state agency reviewing physician, as well as the
3 opinions of the medical expert, Dr. Almquist, supports the ALJ's
4 finding that Plaintiff retains the RFC to perform a wide range of
5 light level work activity. The ALJ's review and assessment of the
6 medical evidence of record is without error. While Plaintiff
7 suggests a more favorable interpretation of the evidence, the
8 ALJ's interpretation is rational and properly supported.³
9 Plaintiff's assertion of error with regard to the ALJ's evaluation
10 of the medical evidence lacks merit.

11 **B. Step Three**

12 Plaintiff asserts that the ALJ failed to take into account
13 the combined effect of her impairments. (Ct. Rec. 16, pp. 37-39).
14 Plaintiff argues that if the ALJ had considered the combined
15 effects, including her ongoing degenerative disc disease of the
16 lower spine and cervical spine, her knee problems, her wrist and
17 hand problems, not to mention her foot problems, probable
18 connective tissue disorder and bilateral radiculopathy with a
19 herniated lumbar disc, he would have found that she equaled a
20 Listings level impairment under the Musculoskeletal criteria or
21 Listings 1.04. (Ct. Rec. 16, p. 38). Therefore, Plaintiff argues
22 that the ALJ erred at step three of the sequential evaluation
23 process.

24 ///

25
26 ³The Court must ultimately uphold the Commissioner's decision where
27 the evidence is susceptible to more than one rational interpretation.
28 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). It is not the role
of the Court to second-guess the Commissioner. If evidence supports more
than one rational interpretation, the court must uphold the decision of the
Commissioner. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

1 The Listings describe, for each of the major body systems,
2 impairments that are severe enough to prevent an individual from
3 doing any gainful activity, regardless of her age, education, or
4 work experience. 20 C.F.R. § 416.925(a). Each Listing specifies
5 the objective medical and other findings needed to satisfy the
6 criteria of that Listing. A diagnosis alone is insufficient; a
7 medically-determinable impairment must also satisfy all of the
8 criteria of the Listing. 20 C.F.R. § 416.925(c), 416.925(d).

9 It is Plaintiff's responsibility to prove that she is
10 disabled at step three of the sequential evaluation process. 20
11 C.F.R. §§ 404.1520(a)(4)(iii), 404.1520(d). Plaintiff bears the
12 burden of establishing that her impairments satisfy the
13 requirements of a Listings impairment. *Tackett v. Apfel*, 180 F.3d
14 1094, 1098-1099 (9th Cir. 1999). A generalized assertion of
15 functional problems is not enough to establish disability at step
16 three. *Id.* at 1100.

17 Plaintiff generally asserts that she equals Listing 1.04.
18 (Ct. Rec. 16, pp. 37-39); 20 C.F.R. Pt. 404, Subpt. P, App. 1, §
19 1.04. Plaintiff does not discuss the criteria for Listings 1.04
20 and fails to cite specific evidence supporting her argument that
21 she meets or equals a Listings impairment. (Ct. Rec. 16, pp. 37-
22 39). "For a claimant to qualify for benefits by showing that
23 [her] . . . combination of impairments is 'equivalent' to a listed
24 impairment, [s]he must present medical findings equal in severity
25 to *all* the criteria for the one most similar listed impairment."
26 *Sullivan v. Zebley*, 493 U.S. 521, 531 (1990). As noted above,
27 Plaintiff bears the burden of establishing that her impairments
28 satisfy the requirements of a Listings impairment. *Tackett*, 180

///

1 F.3d at 1098-1099. Since Plaintiff provides no evidence or
2 discussion as to how she specifically meets or equals a particular
3 Listings impairment, other than a generalized assertion, she fails
4 in her burden to demonstrate she is entitled to disability
5 benefits at step three.

6 In any event, a review of the record, as correctly assessed
7 by the ALJ, does not demonstrate that Plaintiff's level of
8 functioning was consistent with meeting a Listings level
9 impairment.

10 Listing 1.04 is defined as follows:

11 1.04 *Disorders of the spine* (e.g., herniated nucleus
12 pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis,
13 degenerative disc disease, facet arthritis, vertebral fracture),
resulting in compromise of a nerve root (including the cauda
equina) or the spinal cord. With:

14 A. Evidence of nerve root compression characterized by
15 neuroanatomic distribution of pain, limitation of motion of the
16 spine, motor loss (atrophy with associated muscle weakness or
muscle weakness) accompanied by sensory or reflex loss and, if
there is involvement of the lower back, positive straight-leg
raising test (sitting and supine);

17 or

18 B. Spinal arachnoiditis, confirmed by an operative note or
19 pathology report of tissue biopsy, or by appropriate medically
acceptable imaging, manifested by severe burning or painful
20 dysesthesia, resulting in the need for changes in position or
posture more than once every 2 hours;

21 or

22 C. Lumbar spinal stenosis resulting in pseudoclaudication,
23 established by findings on appropriate medically acceptable
imaging, manifested by chronic nonradicular pain and weakness, and
24 resulting in inability to ambulate effectively, as defined in
1.00B2b.

25 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 1.04.

26 Although the ALJ found that, consistent with the medical
27 evidence of record, Plaintiff has the severe impairments of
28 cervical degenerative disease and low back pain (AR 377, 381), no

1 medical professional of record has opined that Plaintiff's
2 impairments are of such severity as to meet or equal Listing
3 1.04A. Furthermore, as noted above, medical expert Almquist
4 testified that Plaintiff would be evaluated under Listing 1.04A
5 and that, in his opinion, she did not meet or equal that Listing.
6 (AR 574-575). Based on the foregoing, Plaintiff failed to
7 establish that she met or equaled the listings requirements of
8 1.04, or any other Listings impairment, and the ALJ did not err at
9 step three of the sequential evaluation process in this regard.

10 **C. Vocational Expert Testimony**

11 Plaintiff lastly contends that the ALJ erred by relying on
12 the testimony of a vocational expert from a prior hearing as
13 evidence to support his finding that Plaintiff was not disabled.
14 (Ct. Rec. 16, p. 46). The Commissioner asserts that the ALJ
15 properly relied on the testimony of the vocational expert
16 regarding the demands of Plaintiff's past relevant work, and his
17 step four finding that Plaintiff could perform her past relevant
18 work. (Ct. Rec. 21, pp. 19-20).

19 Social Security Ruling ("SSR") 82-61 provides that, pursuant
20 to 20 C.F.R. § 404.1520(e) and § 416.920(e), a claimant will be
21 found not disabled when it is determined that she retains the RFC
22 to perform either the actual functional demands and job duties of
23 a particular past relevant job, or the functional demands and job
24 duties of the occupation as generally required by employers
25 throughout the national economy. SSR 82-61. The burden shifts to
26 the ALJ to identify specific jobs existing in substantial numbers
27 in the national economy that Plaintiff can perform despite her
28 identified limitations only after Plaintiff has established a

///

1 prima facie case of disability by demonstrating she cannot return
2 to her former employment. *Hoffman v. Heckler*, 785 F.2d 1423, 1425
3 (9th Cir. 1986).

4 At step four of the sequential evaluation process, the ALJ
5 found that Plaintiff was able to perform her past relevant work
6 and was therefore not disabled within the meaning of the Social
7 Security Act. (AR 380-381). Accordingly, Plaintiff failed in her
8 burden to demonstrate, at step four, that she could not return to
9 her previous jobs.

10 As determined above, the weight of the record evidence in
11 this case supports the ALJ's RFC finding that Plaintiff was
12 capable of performing a wide range of light exertion level work
13 activities with certain postural, manipulative and environmental
14 limitations. (AR 378).

15 A vocational expert testified at an earlier administrative
16 hearing, held on February 15, 2001, that if Plaintiff could lift
17 only 10 pounds maximum, with no repetitive push/pull; no operation
18 of foot controls; no stooping, crouching, kneeling, squatting, or
19 climbing; no heights; had to avoid dust, fumes, gases; and no
20 temperature extremes, Plaintiff would retain the capacity to
21 perform her past relevant work as a medical social worker, a case
22 worker, and a telemarketer. (AR 93-94, 380). The ALJ relied on
23 this testimony in making his step four determination. (AR 380-
24 381).

25 Since the vocational expert's testimony was based on an RFC
26 equivalent to the RFC finding made by the ALJ in this case,
27 Plaintiff's argument with regard to the vocational expert's
28 testimony is without merit. Based upon the proper RFC finding by
the ALJ and the vocational expert testimony regarding the same, it

1 is apparent that the ALJ appropriately determined that Plaintiff
2 retained the capacity to perform her past relevant work and was
3 thus not disabled as defined by the Act. (AR 381).

4 **CONCLUSION**

5 Having reviewed the record and the ALJ's conclusions, this
6 Court finds that the ALJ's decision is supported by substantial
7 evidence and free of legal error. Based on the foregoing, the
8 undersigned concludes that the ALJ properly determined that
9 Plaintiff is not disabled within the meaning of the Social
10 Security Act. Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
13 **DENIED.**

14 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 20**) is
15 **GRANTED.**

16 3. The District Court Executive is directed to enter
17 judgment in favor of Defendant, file this Order, provide a copy to
18 counsel for Plaintiff and Defendant, and **CLOSE** this file.

19 **DATED** this 1st day of November, 2006.

20
21 s/Michael W. Leavitt
22 MICHAEL W. LEAVITT
23 UNITED STATES MAGISTRATE JUDGE
24
25
26
27
28